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Supreme Court of the United States

OCTOBER TERM, ~~1952~~ 1953

No. ~~795~~ [redacted]8

THOMAS QUINN,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

DAVID SCRIBNER,
11 East 51st Street,
New York City.

FRANK J. DONNER,
ARTHUR KINOY,
104 East 40th Street,
New York City.

ALLAN R. ROSENBERG,
416 Fifth Street, N.W.,
Washington, D. C.

Attorneys for Petitioner.

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UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Thomas Quinn, the petitioner herein, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, made December 19, 1952 (R.) reversing the judgment of conviction of the petitioner and remanding the case for a new trial.

Opinions Below

The opinion of the Court of Appeals reversing the judgment of conviction and remanding the case for a new trial is not yet reported (R.). The opinion of the District Court ordering a judgment of conviction is not yet reported (R. 84). The opinions of the District Court denying petitioner's motions to dismiss the indictment are reported at 95 Fed. Supp. 1010, 1012.

Jurisdiction

The judgment of the Court of Appeals was entered on December 19, 1952. A petition for rehearing was denied on April 13, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

Summary Statement of Matter Involved

A. The Congressional Hearing.

The petitioner, Thomas Quinn, is an employee of the Westinghouse Electric Corporation in East Pittsburgh, Pennsylvania, and is a field representative of the United Electrical, Radio and Machine Workers of America (hereafter referred to as UE or the Union), a national labor union representing employees in the electrical, radio and machine industry. He appeared pursuant to subpoena on August 11, 1949, before four representatives of the Committee on Un-American Activities of the House of Representatives. The hearings in which the petitioner testified were subsequently printed by the Committee and are contained in a pamphlet entitled, "Hearings regarding Communist Infiltration of Labor Unions—Part I (Local 601, United Electrical, Radio and Machine Workers of America, CIO, Pittsburgh, Pa.) (Hearings before the Committee on Un-American Activities, House of Representatives, 81st Congr., 1st Session, August 9, 10 and 11, 1949)." *

Petitioner was subpoenaed to appear on August 10th, together with Thomas J. Fitzpatrick and Frank Panzino, fellow employees in the Westinghouse East Pittsburgh plant and fellow members and officers of UE Local 601.

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* These hearings constitute Government Exhibit One, and by agreement of the parties were not printed in the joint appendix in the court below.

All three UE members answered to their subpoenas on August 10, 1949, as directed. Fitzpatrick and Panzino testified before the Committee that day and petitioner testified before the Committee the following morning, August 11, 1949.

At the outset of the hearings the counsel for the Committee formally announced that the purpose of the hearing was to inquire into the question of Communist affiliation of certain members of Local 601 of the UE (R. 115). After several preliminary questions as to employment and membership in the UE, Fitzpatrick, Panzino and petitioner were asked questions concerning alleged membership in the Communist Party. Fitzpatrick was the first of the three UE members to be asked these questions and declined to answer the questions by relying upon "The First and Fifth Amendments" (R. 110) as well as the "First Amendment to Constitution supplemented by the Fifth Amendment" (R. 107). Both Panzino and petitioner, following Fitzpatrick's testimony, refused to answer the identical questions, specifically adopting as their own the grounds relied upon by Fitzpatrick.

B. The Proceedings Below.

Subsequent to their testimony Fitzpatrick, Panzino and petitioner were indicted for violation of Section 192, Title II, U. S. Code, by a grand jury empaneled on October 3, 1950.*

Petitioner was indicted upon a single count for refusal to answer a question as to "whether he was or ever had been a member of the Communist Party" (R. 3).

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* Fitzpatrick and Panzino were subsequently tried and acquitted by the District Court. In *U. S.* v. *Fitzpatrick*, 96 F. Supp. 491, Judge Morris upheld Fitzpatrick's statement as a valid assertion of his Fifth Amendment privilege and entered a judgment of acquittal. Similarly in *U. S.* v *Panzino*, Criminal #1747-50, unreported, District of Columbia, the late Judge Goldsborough upheld Panzino's assertion and entered a judgment of acquittal. See Supplement One to petition for certiorari in *Emspak* v. *U. S.*

On December 17, 1950, petitioner filed a motion to dismiss the indictment and for other appropriate relief upon the grounds, *inter alia*, that the indictment violated the constitutional privilege against self-incrimination contained in the Fifth Amendment to the Constitution (R. 4).

The motion further sought dismissal of the indictment, or, in the alternative, a hearing, on the ground that there were less than twelve members of the Grand Jury which voted the indictment who were impartial and free from prejudice and bias against the defendant (R. 6).

Petitioner attached to the motion a series of affidavits dealing both with the claim of privilege as well as with the contention that the Grand Jury was illegally constituted. Thereafter, petitioner filed a supplementary affidavit attacking the qualifications of the Grand Jurors (R. 34).

On January 19, 1951, Judge Kirkland granted the Government's motion to strike certain of the affidavits and attached exhibits dealing only with the claim of privilege upon the ground that they were not appropriate to be considered in connection with pre-trial motions. On the same day Judge Kirkland, apparently *sua sponte*, struck as legally insufficient petitioner's supplementary affidavit on the qualifications of the Grand Jurors (R. 34). Thereafter petitioner made an offer of proof of the allegations of fact set forth in the affidavits theretofore filed on the qualifications of the Grand Jurors (R. 158).

On January 26, 1951, Judge Kirkland handed down an order and opinion holding, *inter alia*, that neither the circumstances recited in the motion to dismiss nor those referred to in the offer of proof with respect to the qualifications of the Grand Jury justified granting the relief requested by petitioner (R. 63; 95 Fed. Supp. 1010).

Thereafter, on January 31, 1951, Judge Kirkland filed a second opinion holding that the count involved in the

instant indictment, as well as several others with which he dealt simultaneously, "apparently on their face were directed to one single line of inquiry which was a specific phase of inquiry then being considered by the Committee" (R. 66).

After a trial without jury the District Court found the petitioner guilty, holding as a matter of law that the Fifth Amendment privilege may not be asserted by referring to and adopting the language used by another (R. 138).

The petitioner was sentenced on February 26th to a term of four to twelve months and a fine of $1,000 (R. 84). On February 27th the judgment and commitment was vacated and sentence of one year imprisonment and $500 fine was imposed by Judge Kirkland (R. 84). On February 28th this judgment and commitment was vacated by Judge Kirkland and the original judgment reinstated (R. 85). On May 18th the judgment of February 26th was vacated by Judge Kirkland and sentence of six months' imprisonment and $500 fine was imposed (R. 86).

On October 5, 1951, an appeal from the judgment of the District Court was argued before a division of the Court of Appeals. Several months thereafter the Court of Appeals *sua sponte* ordered the appeal set down for reargument before the Court *en banc*. Pursuant to this order reargument was heard before the full Court *en banc* in May, 1952. On December 19, 1952, the Court of Appeals *en banc* filed its opinions reversing the judgment of conviction and remanding the case to the District Court for a new trial. There was no majority of the Court on any one major issue in the case.

C. Statutes, Resolutions and Rules Involved.

1. 2 U. S. C. § 192; R. S. § 103, as amended June 27, 1938, c. 594, 52 Stat. 942.

Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2. H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15 (January 3, 1945).

Resolved, That the rules of the Seventy-eighth Congress be, and they are hereby, adopted as the rules of the Seventy-ninth Congress.

That rule X of the Rules of the House of Representatives is amended by adding after clause 40a of the first paragraph a new clause to read as follows:

'40b. On Un-American Activities, to consist of nine members.'

Rule XI of the Rules of the House of Representatives is amended by adding after clause 40a two new clauses to read as follows:

'40b. To Un-American Activities—to the Committee on Un-American Activities.

'40c. The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

'The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

'For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the Committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.'

3. Rules of Criminal Procedure:

Rule 6. The Grand Jury.

(b) OBJECTIONS TO GRAND JURY AND TO GRAND JURORS.

(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

(b) THE MOTION RAISING DEFENSES AND OBJECTIONS.

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of deter-

mination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense *may be raised* only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

Questions Presented

1. Whether petitioner asserted the Fifth Amendment privilege against self-incrimination in response to a question put to him by a Sub-Committee of the House Committee on Un-American Activities.

2. Whether the conviction of the petitioner is barred under the principles of *res adjudicata* and estoppel.

3. Whether a witness before a Congressional Committee must be specifically directed to answer by the Committee before he can be held in violation of Title 2, Section 192.

4. Whether House Resolution 5, as construed and applied herein, abridged the petitioner's freedom of speech, press and assembly in violation of the First Amendment to the Constitution.

5. Whether the motion for a hearing to investigate the qualifications of the grand jury was improperly denied in the face of a detailed offer of proof and affidavits showing the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by failing to indict petitioner at the government's request.

Reasons for Granting the Writ

There is presented here for decision a fundamental question involving the interpretation, application and enforcement of the constitutional privilege against self-incrimination guaranteed by the Fifth Amendment to the Constitution of the United States. This is a question which has not yet been but should be considered and authoritatively settled by this Court.

There are presented also questions relating to the impact of Congressional investigations and inquiries upon the fundamental liberties and rights of citizens guaranteed by the U. S. Constitution. There are also presented questions relating to the administration of federal criminal procedure, which require the consideration of this Court.

Certain of these questions are of general importance relating to the construction and application of the Constitu-

tion of the United States as well as statutes of the United States decided by the U. S. Court of Appeals for the District of Columbia which have not been but should be settled by this Court. These questions have been decided in a way in conflict with the decisions of other Circuit Courts of Appeal on the same matter and have been decided in a way probably in conflict with the applicable decisions of this Court.

I

The lower court erred in not directing a judgment of acquittal on remand in that the petitioner properly asserted the Fifth Amendment privilege against self-incrimination.

A central issue in this petition involves a fundamental question relating to the interpretation of the constitutional privilege against self-incrimination guaranteed by the Fifth Amendment.

The trial court convicted the petitioner solely upon the theory that one may not invoke the Fifth Amendment privilege by referring to and incorporating the assertion and position of another witness. Eight of the nine Court of Appeals judges agreed that the district court was in error in so holding,* and the Government so conceded before the Court of Appeals.

The Court of Appeals, therefore properly concluded that the question thus posed was "whether Quinn, by adopting Fitzpatrick's statement, asserted a privilege against self-incrimination. Basically, of course, that question concerns what was in Quinn's mind. But courts cannot act upon unrevealed intentions, and so the *inquiry must be whether Fitzpatrick did or did not claim the privilege*". (Emphasis added.)

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* Judge Clark indicated his agreement with the holding of the District Court.

Since it was conceded that the question asked petitioner was incriminating *per se* (R. 89) and that proper circumstances existed for the assertion of a claim of Fifth Amendment privilege (R. 128), compare *Blau* v. *U. S.*, 340 U. S. 159, the issue before the Court of Appeals was whether Fitzpatrick's statement that he refused to answer on the grounds of "the First and Fifth Amendment" as well as the "First Amendment supplemented by the Fifth Amendment" constituted an assertion of the Fifth Amendment constitutional privilege.

There was no agreement within the Court of Appeals as to whether these words constitute a claim of constitutional privilege. A majority of the court concluded that the determination as to whether or not these words constituted a claim of privilege must be made by a trial court on remand of the case.

Judge Prettyman in the opinion in which Chief Judge Stevens and Judge Washington joined states that "If we were of the clear opinion that Fitzpatrick and therefore Quinn did claim the privilege and so must be acquitted, we should dispose of the matter finally here and now. Under such circumstances we should reverse a judgment of conviction. But a majority of the Court are not of that clear opinion" (R.).

The issue is thus directly presented to this Court as to whether an assertion of the "Fifth Amendment" constitutes an assertion of the constitutional privilege. In the petition for certiorari filed this day in the case of *Emspak* v. *United States*, we have set forth the reasons why this Court should grant review of this question. We adopt and incorporate herein the reasons and arguments of this point there stated.

II

Since conviction of the petitioner is barred under principles of res adjudicata and estoppel the Court of Appeals should have reversed and directed a judgment of acquittal.

The Court of Appeals has held for the first time in the proceeding that the "inquiry must be whether Fitzpatrick did or did not claim the privilege". A federal court has, however, already held that Fitzpatrick did in fact claim the constitutional privilege. Judge Morris in the district court, hearing testimony prior to the date of petitioner's trial held in an opinion specifically and directly that the witness Fitzpatrick did in fact claim the Fifth Amendment privilege. *U. S.* v. *Fitzpatrick,* 96 F. Supp. 491. Under the governing principles of *res adjudicata* and estoppel the government may not retry the issue of whether Fitzpatrick claimed the constitutional privilege. The Court of Appeals should have directed the District Court to enter a judgment of acquittal upon remand.

It has long been held by this Court that the principles of *res adjudicata* and estoppel are "as applicable to the decisions of criminal courts as to those of civil jurisdiction". *Frank* v. *Mangum,* 237 U. S. 309, 334. The Fifth Amendment provision against double jeopardy was not intended to supplant the fundamental principle of *res adjudicata* in criminal cases. *Collins* v. *Loisel,* 262 U. S. 426, 430. As this Court pointed out in *U. S.* v. *Oppenheimer,* 242 U. S. 85, 87, " * * * the proposition of the government is that the doctrine of *res adjudicata* does not exist for criminal cases except in the modified form of the Fifth Amendment that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb. * * * It seems that the mere statement of the position shall be its own answer. It cannot be that the safeguards of the person, so often and so rightly men-

tioned with solemn reverence, are less than those that protect a liability in debt." * See also 25 Va. Law Review 839, *Res Judicata as a plea in criminal prosecution;* and 10 Washington Law Review 198, *The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases.*

Under the basic principles of estoppel by judgment the Government is barred from retrying the issue of whether Fitzpatrick asserted the privilege. The Court of Appeals has held that petitioner's criminal liability rests solely upon an inquiry into whether Fitzpatrick claimed the privilege. Where the liability of a person rests upon the act of another a valid judgment on the merits in favor of the latter binds a plaintiff as against the former. *Restatement of Judgments,* Section 99. This rule of estoppel reflects the fundamental policy that "the person against whom the rule works adversely has had his day in court". *Restatement of Judgments,* Section 99, comment a).

Where the liability of an individual rests upon a characterization of an act of another, a judgment on those facts in favor of the primary actor is a bar to litigation even though the individual asserting the bar was not a party to the original action. *Freeman on Judgments,* Section 451, p. 994. This Court has enunciated this principle in *Bigelow* v. *Old Dominion Copper Co.,* 225 U. S. 111, 127:

> "An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts,

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* Freeman on Judgments—Vol. 2, 5th Ed., Sect. 648, p. 1364:

"There is no reason why a final judgment in a criminal prosecution or proceeding should not, under proper circumstances, be given conclusive effect as an estoppel or bar. The same policy which dictates the rule in civil cases requires it in criminal cases.

"* * * The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases. * * *"

when sued by the same plaintiff. See Portland Gold Mining Co. v. Straton's Independence, 158 Fed. Rep. 63, where the cases are collected." See also *New Orleans & N. E. R. R. Co.* v. *Japes*, 142 U. S. 18, 24, 27.

Under these principles the Government is estopped from retrying the issue of whether Fitzpatrick claimed the constitutional privilege. The Court of Appeals has now held that the question of petitioner's criminal liability rests upon a determination of whether in fact Fitzpatrick claimed his privilege. The Government has had its day in court on that issue and it has been decided adversely to the Government. That issue may not now be retried under the applicable decisions of this Court and the general principles of estoppel. The Court of Appeals should have directed a judgment of acquittal upon the remand.

III

A witness before a Congressional Committee must be specifically directed to answer by the Committee before he can be held in violation of Title 2, Section 192.

While the lower court held that it was not necessary for the Committee specifically to direct the witness to answer, it ruled that the Committee must clearly dispose of his objections. Since the record of the hearing indicates that the Committee in no way overruled petitioner's objections the lower court should have dismissed on remand. For all the reasons set forth in the accompanying petition for certiorari in *Emspak* v. *United States*, petitioner urges that the Court review this question. The arguments and reasons on this point set forth in the petition for certiorari in *Emspak* v. *United States*, are adopted and incorporated herein.

IV

The First Amendment protects a witness before a Congressional Committee against the compulsory disclosure of his political views and associations.

The question of the Committee for which petitioner was indicted was an inquiry into his political opinions and affiliations. For all the reasons set forth the accompanying petition for certiorari in *Emspak* v. *United States* petitioner herein urges that the Court review this question presented. The arguments and reasons on this point set forth in the petition for certiorari in *Emspak* v. *United States* are adopted and incorporated herein.

V

The ruling of the Court of Appeals affirming the denial of petitioner's request for a hearing on his motion challenging the validity of the Grand Jury is in conflict with the decision of this Court in *Dennis* v. *United States*.

There were twenty members of the indicting Grand Jury who voted on petitioner's indictment. Counsel for the Government has conceded that ten of these Grand Jurors were Government employees and two additional were wives of Government employees (R. 161). Petitioner moved under Rule 12 of the Federal Rules of Criminal Procedure for a hearing on his motion to dismiss the indictment as void in that there were not 12 duly qualified and impartial jurors. *Crowley* v. *United States*, 194 U. S. 461; *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (C. A. 2); 18 U. S. C. A. 554a; Rule 6(a)(2), Federal Rules of Criminal Procedure. The district court by Kirk-

land, J., denied the request for a hearing and rejected petitioner's proffer of proof in support of the motion (R. 63). The Court of Appeals upheld the district court's denial of a request for a hearing, although no majority could be found to support any one basis for this refusal. The question presented herein is identical with question four presented in the petition for certiorari in *Emspak* v. *United States*. Petitioner respectfully adopts and incorporates herein all of the reasons and arguments set forth on this point in the petition for certiorari in *Emspak* v. *United States*. For all of the reasons and arguments set forth there and incorporated herein petitioner respectfully urges that this Court grant review of this substantial question.

CONCLUSION

It is respectfully submitted for all the reasons stated herein that this petition for writ of certiorari should be granted.

David Scribner,
11 East 51st Street,
New York City.

Frank J. Donner,
Arthur Kinoy,
104 East 40th Street,
New York City.

Allan R. Rosenberg,
416 Fifth Street, N.W.,
Washington, D. C.

Attorneys for Petitioner.